FILED
NOV 13 1980
MICHAEL RODAK, JR., CLE

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

MIKE GREELY
Counsel of Record
Attorney General
State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

MIKE McGRATH
Assistant Attorney General

MIKE McCARTER
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601
(406) 449-2026

ROSS CANNON
Cannon & Gillespie
2031 Eleventh Avenue
Helena, Montana 59601
(406) 442-9930

ATTORNEYS FOR APPELLEES

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

STATEMENT OF THE QUESTIONS PRESENTED

1. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax did not impose an unconstitutional burden on interstate commerce in light of the unbroken line of precedents in this and other courts sustaining such taxes over Commerce Clause challenges?

2. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax satisfied the Commerce Clause requirement that a tax be fairly related to services provided by the state in light of the fact that Montana has provided the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society [*Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 445 (1979)]?

3. Was the Montana Supreme Court correct in concluding that Montana's severance tax, which is "imposed on each ton of coal produced in the state," did not discriminate against interstate commerce?

4. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax was not preempted by federal legislation under the Supremacy Clause in light of the appellants' failure to identify any federal policy to limit state severance taxes on coal?

5. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax was not preempted under the Supremacy Clause by the Mineral Lands Leasing Act of 1920 in light of the specific provision in that statute declaring inviolate "the rights of the States . . . to exercise any rights which they may have, including the right to levy and collect taxes upon . . .output of mines . . . of any lessee of the United States?"

TABLE OF CONTENTS

Pages

Statement of the Case 1

The Proceedings Below 2

Statement of Facts 3

Introduction to Argument 5

Argument:

This appeal does not present substantial federal questions and should accordingly be dismissed. 6

I. The Montana Supreme Court's decision sustaining Montana's coal severance tax is fully supported by settled Commerce Clause principles and sound institutional considerations. 6

A. The decisions of this and other courts repudiating Commerce Clause challenges to state severance taxes reflect wise and established principles of Commerce Clause adjudication and should not be distinguished. 8

B. Assuming *arguendo* that this Court's severance tax cases are not dispositive, appellant's Commerce Clause claims still fail to raise a substantial federal question. 12

1. The Montana coal severance tax does not discriminate against interstate commerce and is not "tailored" to fall on residents of other states. 13

TABLE OF CONTENTS—Continued

Pages

2. Montana's coal severance tax is fairly related to benefits provided to appellants by the state. 14

C. Sound institutional considerations reinforce the conclusion that appellants' Commerce Clause claims should be dismissed. 16

II. The Montana Supreme Court's decision rejecting the claims that Montana's coal severance tax is preempted by federal legislation is fully justified in light of appellants' failure to identify any federal law or policy intended to limit the amount of state severance taxes on coal. 20

A. Montana's coal severance tax is not preempted by broad national policies allegedly favoring the use of coal. 21

B. Montana's coal severance tax is not preempted by the Mineral Lands Leasing Act of 1920 in light of the specific provision in the Act declaring inviolate the rights of the states to impose severance taxes. 24

Conclusion 25

TABLE OF AUTHORITIES

CASES:

Alaska v. Arctic Maid, 366 U. S. 199 (1961) 10

Bel Oil Corp. v. Roland, 242 La. 498, 137 So. 2d 308, appeal dismissed, 371 U. S. 2 (1962) 6

TABLE OF AUTHORITIES—Continued

Pages

City of Pittsburgh v. Alco Parking Corp., 417 U. S. 369 (1974) 18

Colonial Pipeline Co. v. Traigle, 421 U. S. 100, 109 (1975) 15

Conley v. Gibson, 355 U. S. 41 (1957) 5

Department of Revenue v. Association of Washington Stevedoring Cos., 435 U. S. 734 (1978) 15

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U. S. 537, 541 (1969) 11

Exxon Corp. v. Wisconsin Department of Revenue, 100 S. Ct. 2109, 2122 (1980) 15, 23

Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 199 (1824) 23

Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922) 6, 7, 8, 9, 10, 12

Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927) 6

Japan Line, Ltd. v. County of Los Angeles, 441 U. S. 434, 445 (1979) ..... i, 15

Magnano Co. v. Hamilton, 292 U. S. 40 (1934) 18

Mid-Northern Oil Co. v. Montana, 268 U. S. 45, 50 (1925) 25

Minnesota v. Blasius, 290 U. S. 1, 8 (1933) 9

Mobil Oil Corp. v. Commissioner of Taxes, 100 S. Ct. 1223, 1237 (1980) 23

Moorman Manufacturing Co. v. Bair, 437 U. S. 267, 280 (1978) 20

TABLE OF AUTHORITIES—Continued

Pages

National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937) 8, 9

Nippert v. City of Richmond, 327 U. S. 416 (1940) 13

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (1923) 6

Philadelphia v. New Jersey, 437 U. S. 617, 622-23 (1978) 10

Post Oak Oil Co. v. State Tax Commission, 575 P. 2d 965 (Okla. 1978) 6

Western Livestock v. Bureau of Revenue, 303 U. S. 250, 254 (1938) 14

Wickard v. Filburn, 317 U. S. 111 (1942) 9, 10

STATUTE:

Section 15-35-103, MCA 3, 13

CONSTITUTION:

U. S. Const., Art. I, § 8, cl. 3 ..... 9, 19

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Montana on the ground that the cause does not present a substantial federal question.

STATEMENT OF THE CASE

"This case," as appellants observe, "presents issues as old as the Republic and as timely as tomorrow's headlines." (Appellants' Jurisdictional Statement 2, hereinafter cited as "J. S.") Indeed, stripped of the contempo-

rary emotionalism surrounding them, these issues are indistinguishable from those that this Court has resolved in the past precisely as the Montana Supreme Court resolved them in this case. The state court's decision rejecting appellants' attack on the constitutionality of Montana's coal severance tax is rooted in settled principles of Commerce Clause adjudication and preemption analysis. It reflects sound institutional considerations as well. There is nothing new in this case other than appellants' unprecedented efforts to persuade this Court to undertake the constitutionally unwarranted and judicially unmanageable task of establishing the appropriate rate of a state tax levied for the general support of government.

THE PROCEEDINGS BELOW

The appellants allege that because of its rate the Montana coal severance tax creates a burden on interstate commerce and frustrates federal energy policies regarding the use of coal. The State moved to dismiss appellant's complaints asserting that as a matter of law the tax does not burden interstate commerce nor does it frustrate any national energy policy. The district court granted the motion, the Montana Supreme Court affirmed and the appellants now seek review by this Court. The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is reported at 615 P. 2d 847. It is reprinted in the Appendix to the Jurisdictional Statement, at pages 1a-40a.

STATEMENT OF FACTS

Montana imposes a severance tax on "each ton of coal produced in the state" based on the value and energy content of the coal and the method of extraction. Section 15-35-103, MCA. The tax applies equally to coal sold and consumed in Montana as well as coal destined for out of state. The effective rate of the tax is substantially less than the statutory thirty percent (30%) due to deductions allowed for other taxes paid on production. § 15-35-103, MCA.

Montana is not unique in imposing severance taxes. Severance taxes, which are excise taxes on the extraction of natural resources, are an important source of state revenue. The first such tax was imposed by the State of Michigan in 1846[1] and by 1979 thirty-three states had adopted some type of severance tax.[2] Severance taxes are levied on oil, gas, coal, copper, potash, uranium, molybdenum, vermiculite, sulfur, dolomite, sand, gravel, limestone, forest products, iron, taconite and even salt. In terms of total state revenues, severance taxes in 1979 represented 25.5% of total tax collections for Wyoming; 22% for Louisiana; 21.1% for Alaska; 18.5% for Oklahoma; 18% for Texas; and 13.5% for Montana.[3]

---

1 United States Department of Agriculture: State Taxation of Mineral Deposits and Production (1978).

2 U. S. Department of Commerce: Bureau of Census State Government Tax Collections in 1979 (1980), Table 3.

3 See U. S. Department of Commerce: Bureau of Census, State Government Tax Collections in 1979 (1980), Table 3. Collections by the top ten states for 1979 were as follows:

(Continued on next page)

When viewed as a tax on energy, Montana's coal tax compares favorably with the tax rates imposed on oil and gas by Texas, Louisiana, Oklahoma and New Mexico. In a recent study undertaken by the Texas Comptroller of Public Accounts, the Texas severance tax amounted to 6.36 cents per million BTUs of oil and gas in fiscal 1977. The rates per million BTUs in Louisiana, Oklahoma and New Mexico were 10.26, 8.13 and 7.76 cents respectively. Montana's rate per million BTUs of coal was approximately 7.11 cents.

The appellants continue to assert that the coal taxed by Montana is federal coal, and thus belongs to the people of the United States as a whole. What they ignore is that through leases the federal government has sold its interest in the coal and the people of the United States, through royalties, will receive their fair rate of return. As noted by the Montana Court:

> The coal being taxed here . . . is not "our" coal, but the personal property of the plaintiffs who produced it under lease or permit. When the coal is mined, the federal government is in no different position as a lessor than a private lessor who grants a mining lease or permit. (J. S. 27a.)

Finally, we do not concede as true the factual statements made in the Jurisdictional Statement. Rather, ap-

---

(Continued from previous page)

1.	Texas	$1,025,550,000
2.	Louisiana	$ 511,589,000
3.	Oklahoma	$ 280,982,000
4.	Alaska	$ 173,685,000
5.	New Mexico	$ 159,431,000
6.	Kentucky	$ 154,017,000
7.	Florida	$ 91,901,000
8.	Wyoming	$ 87,419,000
9.	Minnesota	$ 71,263,000
10.	Montana	$ 53,919,000

pellees adopt the position that the appellants can prove no set of facts in support of their claim that entitles them to relief. *See Conley v. Gibson,* 355 U. S. 41 (1957).

———o———

INTRODUCTION TO ARGUMENT

The power of states to tax is, of course, not unlimited. However, the appellants' attack upon Montana's severance tax does not fall within any heretofore recognized constitutional limits on state powers. Rather, it strikes at the very heart of the federalist system.

Since the appellants have conceded that some level of Montana's severance tax is permissible, they are asking this Court to determine the rate. If thirty percent is too high, will this Court find a 28 percent rate, a twenty-five percent rate, or a fifteen percent rate to be acceptable? What appellants propose under the guise of the Commerce and Supremacy Clauses is that the courts determine state tax rates utilizing hypothetical economic models, theories and projections, all based on unquantifiable assumptions. If appellants' contentions are adopted, no state tax will be safe.

The economies and resources of the states are diverse, and each state has adopted a system of taxation suitable to its own needs and resources. States rich in mineral deposits utilize mineral severance taxes; states with significant industry may levy manufacturing taxes or adopt significant corporate franchise or income taxes. New York derives significant revenues from its stock and document

transfer taxes,[4] and states with significant tourism utilize sales, motel and other consumption type taxes which may fall heavily on tourists.[5] All of these taxes may be passed on to nonresidents. Undertaking the examination of state taxes which appellants propose would create chaos in state financial planning and present the court system with an impossible task—legislating state tax rates.

ARGUMENT

This appeal does not present substantial federal questions and should accordingly be dismissed.

I. The Montana Supreme Court's decision sustaining Montana's coal severance tax is fully supported by settled Commerce Clause principles and sound institutional considerations.

The decision of the Montana Supreme Court is the most recent of an unbroken line of precedents in this and other courts rejecting Commerce Clause attacks on state severance taxes. *See, e. g., Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923); *Hope Natural Gas Co. v. Hall*, 274 U. S. 284 (1927); *Bel Oil Corp. v. Roland*, 242 La. 498, 137 So. 2d 308, *appeal dismissed*, 371 U. S. 2 (1962); *Post Oak Oil Co. v. State Tax Commission*, 575 P. 2d 965 (Okla.

4 In 1979 the states collected almost a billion dollars in document and stock transfer taxes. Of this, New York and Florida accounted for two-thirds. New York's collections alone amounted to 430 million dollars.

5 See Charles E. McClure, Jr., *The Interstate Exporting of State and Local Taxes:* Estimates of 1962, 20 National Tax Journal 49, 64 (1967).

1978). Indeed, the taxpayers' allegations that were dismissed in these cases are indistinguishable from those asserted by appellants here. For example, in the seminal case of *Heisler v. Thomas Colliery Co., supra,* the taxpayers contended, just as appellants contend here, that a severance tax upon coal destined for shipment to other states burdened interstate commerce. In support of this contention it was argued, just as appellants argue here, that:

> Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern States. Eighty percent of such coal is shipped out of Pennsylvania . . . [and the] intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of other States to pay a tax to Pennsylvania. . . . [260 U. S. at 251-52.]

Despite these allegations and predictions of dire consequences to the nation if the tax should be sustained, this Court concluded that Pennsylvania's tax on the local activity of severing natural resources from the earth did not constitute a burden on interstate commerce within the meaning of the Commerce Clause.

There is nothing about the instant controversy that would remove it from the rule of *Heisler* and its progeny, and the appellants make no effort to distinguish the present case from those that have uniformly rejected claims identical to theirs. Instead, recognizing that their Commerce Clause allegations are foreclosed by this Court's severance tax decisions, the appellants are compelled to attack the authority of the decisions themselves in their efforts to avoid summary dismissal of their claims. They

suggest that the Court's severance tax decisions no longer reflect "the law" (J. S. 16) and that the law reflected in the Court's contemporary Commerce Clause opinions cannot be reconciled with the results of the earlier cases. In its carefully reasoned opinion, the Montana Supreme Court rejected both of these contentions, even going so far as to rule on appellants' claims on the assumption that this Court's severance tax decisions were not dispositive. (J. S. 19a-27a.) Hence, as the opinion below demonstrates, appellants' claims are insubstantial on any view of the force of these precedents. Moreover, in light of the essential nature of appellants' contention in this case—which is simply that the rate of the tax is too high—the correctness of the result reached by the Montana Supreme Court cannot be questioned.

A. The decisions of this and other courts repudiating Commerce Clause challenges to state severance taxes reflect wise and established principles of Commerce Clause adjudication and should not be distinguished.

The settled rule that state severance taxes raise no substantial Commerce Clause issue was right when it was first articulated in *Heisler v. Thomas Colliery Co., supra,* and it is right today. The principle underlying the doctrine is simple: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause. Under this principle, state severance taxes have never been viewed as imposing a burden on interstate commerce.

Appellants seek to discredit this principle by involving precedents dealing with the scope of congressional power under the Commerce Clause. *See, e. g., Na-*

tional Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937); *Wickard v. Filburn*, 317 U. S. 111 (1942). They contend that congressional authority to regulate an activity under the Commerce Clause's affirmative grant of power to Congress "to regulate Commerce . . . among the several States," U. S. Const., Art. I, § 8, cl. 3, carries with it the implication that a state tax on such activity imposes a burden on interstate commerce under the negative implications of the Clause. (J. S. 16-18.) The argument is based on the false premise that the Commerce Clause considerations bearing on the scope of congressional power are identical to those bearing on the limitations on state power.

This Court has consistently recognized the substantial differences between these two questions. *See, e. g., Minnesota v. Blasius*, 290 U. S. 1, 8 (1933). Indeed, while appellants cite *Wickard v. Filburn, supra,* for the proposition that the Commerce Clause's negative restraints have been broadened by decisions expansively construing the scope of congressional power (J. S. 17), the Court in *Wickard* made exactly the opposite point. The scope of congressional authority depended on an inquiry into "what was 'necessary and proper' to the exercise by Congress of its granted power," 317 U. S. at 121, whereas the point of reference for limitations on state authority was the "concept of sovereignty . . . implicit in the status of statehood." *Id.* Hence in determining whether Congress had the authority under the Commerce Clause to regulate activities affecting interstate commerce, the Court in *Wickard* was not confined by the holdings in such cases as *Heisler* that state taxes concerning such activity imposed no burden on interstate commerce. This was not because these cases

"no longer accurately reflected the law," as appellants suggest. (J. S. 17.) It was rather because the considerations underlying the scope of federal powers that Congress may exercise under the Commerce Clause are different from those bearing on the Clause when it functions as a negative restraint on state powers. Thus, to take the facts of *Wickard* itself, it can hardly be contended that the existence of congressional power to regulate the production of wheat grown for "home" consumption warrants the inference that a state tax upon such consumption imposes a burden on interstate commerce. Nor does the fact that there may be a single definition of interstate commerce for Commerce Clause purposes, *see, e. g., Philadelphia v. New Jersey,* 437 U. S. 617, 622-23 (1978), advance appellants' cause here. Whatever may be the definition of interstate commerce, the Court has made it clear that:

> statements . . . made in upholding the rights of States to tax what was argued to be interstate commerce . . . are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the Commerce Clause. The restrictions imposed by the Commerce Clause standing alone may well be less than the pre-emptive reach of statutes passed by Congress pursuant to the power. [*Douglas v. Seacoast Products, Inc.,* 431 U. S. 265, 282 n. 17 (1977).]

The Court itself has given every indication that the holdings of cases like *Heisler* have lost none of their controlling force. In *Alaska v. Arctic Maid,* 366 U. S. 199 (1961), the Court, in holding that a license tax on the business of commercial fishing did not constitute a burden on interstate commerce, declared:

> The process of gathering fish either through the catcher boats that are part of respondents' fleet or through independent operators is a "local activity" (*Michigan-Wisconsin Pipe Line Co. v. Calvert, supra*) [347 U. S. 157] 166 (1954) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer v. Witsell, supra*) [334 U. S. 385 (1948)] and the extraction of ore (*Oliver Iron Mining Co. v. Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach. Catching the fish or obtaining them in other ways from the local market is but an extension of the freezer ship's operations within Alaska's waters. [366 U. S. at 203-04.]

In *Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U. S. 537, 541 (1969), the Court similarly observed:

> The extraction of a natural resource within a State is not immunized from state taxation merely because, once extracted, the product will immediately be shipped out of the state for processing and sale to consumers. *Alaska v. Arctic Maid,* supra, at 203-04; *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172, 177-79 (1923).

In short, the Court's severance tax cases stand for the proposition that a state tax imposed on the extraction of natural resources within the state does not burden interstate commerce. This Court's contemporary Commerce Clause opinions plainly indicate that these cases continue to support that proposition. For these reasons, the appel-

lants' claim that Montana's coal severance tax violates the Commerce Clause fails to raise a substantial federal question and should accordingly be dismissed.

B. Assuming arguendo that this Court's severance tax cases are not dispositive, appellant's Commerce Clause claims still fail to raise a substantial federal question.

While the Court below properly concluded that *Heisler* and cases like it were dispositive of appellants' Commerce Clause claims, it nevertheless went on to consider these claims on the assumption that the severance tax cases were not controlling. (J. S. 19a-27a.) On this assumption, the validity of Montana's coal severance tax under the Commerce Clause depended on whether it

> is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. [*Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 279 (1977).]

Applying these standards, the Court held that appellants' Commerce Clause claims were without merit. Specifically, the Court rejected appellants' claims that Montana's coal severance tax discriminated against interstate commerce and was not fairly related to services provided by the state. Appellants conceded below that the tax satisfied the Court's nexus and apportionment criteria. Brief of Plaintiffs-Appellants 52. The state court's determination is amply supported by established principles of Commerce Clause adjudication and provides an independent

basis for summarily dismissing appellants' Commerce Clause claims.

1. The Montana coal severance tax does not discriminate against interstate commerce and is not "tailored" to fall on residents of other states.

Montana's coal severance tax is "imposed on each ton of coal produced in the state." Section 15-35-103, MCA. The levy is nondiscriminatory on its face: it applies to all coal extracted in the state; it applies without regard to the ultimate destination of the coal—whether inside or outside the state; and it applies without regard to the nature of the enterprise extracting the coal—whether local or interstate. No claim can plausibly be made that the coal severance tax explicitly discriminates against interstate commerce.

It is true, of course, that the Commerce Clause's proscription against discriminatory taxes is not limited to taxes that discriminate on their face against interstate commerce. The Clause also forbids taxes which, though nondiscriminatory on their face, by their practical operation discriminate against interstate commerce. *See, e. g., Nippert v. City of Richmond,* 327 U. S. 416 (1940). Montana's coal severance tax cannot reasonably be characterized as such a levy, however. To the extent that either local or interstate business shoulders the burden of the tax, such burden is borne according to the amount or value of the coal extracted and not according to any distinction—in principle or in practice—between local and interstate commerce. Moreover, if appellants' claim of discrimination is predicated on the fact that the coal in question is transported out-of-state so that the tax burden

allegedly falls on out-of-state consumers, it likewise fails to state a claim under the Commerce Clause. The states do not discriminate against interstate commerce—nor do they improperly "tailor" their tax to fall on residents of other states—when they demand from those consuming local resources payment for a share of the costs imposed on and the benefits provided by the state with respect to the extraction of these resources. Interstate commerce, the court has frequently reiterated, must pay its way. *See, e. g., Western Livestock v. Bureau of Revenue,* 303 U. S. 250, 254 (1938). Finally, to the extent that appellants' discrimination and "tailored tax" claims are rooted in their allegation that interstate commerce is being made to pay *more* than its way, such claims in substance raise their independent contention that the coal severance tax is not fairly related to benefits provided by the state. (J. S. 20.) Because this contention is without merit (see pp. 17-19 *infra*), any claims based upon it must likewise be dismissed.

2. Montana's coal severance tax is fairly related to benefits provided to appellants by the state.

The state court's determination that Montana's coal severance tax is fairly related to benefits provided by the state is unassailable in light of this Court's precedents applying that test. Montana has provided the appellants with the benefits of fire and police protection. It has provided them with benefits of an educated work force. It has provided them with the benefits of roads and waterways. It has provided them with the benefits of an organized government and an orderly system of laws. In short, Montana has provided the appellants with the benefits of a civilized society—the economic infrastructure and

social machinery that are essential preconditions to the conduct of modern economic activity—including the appellants' operations. Moreover, Montana has provided the taxpayers with the extraordinary benefits they derive from extracting a valuable, nonrenewable resource from the earth of Montana.

These benefits are of incalculable value and plainly satisfy the Commerce Clause requirement that a tax be fairly related to benefits provided by the state. The Court's recent observation concerning the application of this test to a California levy is dispositive here:

> The tax . . . is "fairly related to the services provided by" California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society. [*Japan Line, Ltd. v. County of Los Angeles,* 441 U. S. 434, 445 (1979).]

See also Exxon Corp. v. Wisconsin Department of Revenue, 100 S. Ct. 2109, 2122 (1980). While appellants suggest that the "fair relation" test is one that requires a detailed factual inquiry into the value of the governmental benefits provided to the taxpayer (J. S. 20), this Court's precedents make it clear that no such undertaking is contemplated. *See, e. g., Japan Line, Ltd. v. County of Los Angeles, supra; Colonial Pipeline Co. v. Traigle,* 421 U. S. 100, 109 (1975). To be sure, the Court did remark in *Department of Revenue v. Association of Washington Stevedoring Cos.,* 435 U. S. 734 (1978), that "[n]othing in the record suggests that the tax is not fairly related to services provided by the State." *Id.* at 750-51. As Justice Powell pointed out in his concurring opinion, however, "this statement *cannot* be questioned" since the tax-

payers "undoubtedly avail themselves of police and fire protection, as well as other benefits [the state] offers its local businesses." *Id.* at 764 (emphasis supplied). Since appellants undoubtedly avail themselves of fire and police protection as well as the benefits of a trained work force and the civilized society that Montana offers its local businesses, it cannot be questioned that the coal severance tax is fairly related to benefits provided by the state.

* * *

In sum, the Montana Supreme Court's rejection of appellants' contentions that the coal severance tax discriminates against interstate commerce and is not fairly related to benefits provided by the state reflects a proper application of settled Commerce Clause principles and independently supports the conclusion that appellants' Commerce Clause claims fail to raise a substantial federal question.

C. Sound institutional considerations reinforce the conclusion that appellants' Commerce Clause claims should be dismissed.

While established constitutional doctrine requires the summary dismissal of appellants' Commerce Clause claims, there are additional factors, perhaps the most significant, that strongly support the legal principles delineated above. Fundamental considerations regarding the appropriate role of the courts in adjudicating state tax controversies reinforce—if they do not independently compel—the conclusion that appellants' Commerce Clause claims must be dismissed.

The heart of appellants' case is simply that the rate of Montana's coal severance tax is too high (J. S. i.) They

explicitly concede that Montana may impose a coal severance tax on their activities (J. S. 15). Presumably appellants would not be heard to complain about a severance tax of one, two, or three percent of the contract sales price of the coal. Such a tax would undoubtedly be viewed by appellants as demanding from them no more than their "fair share" of the costs they impose and the benefits they derive from the state and would not be regarded as discriminatory. When, however, the rate is not three but 30 percent, the appellants vigorously attack the levy as discriminatory and unfairly related to benefits provided by the state. Plainly, then, it is the rate of the coal severance tax—and only the rate—that is at issue in this case.

In view of this fact, it is apparent that the appellants are asking this Court to do what no court has ever done, namely, to determine the appropriate rate of a general excise tax. This is the inescapable conclusion that emerges from the appellants' assertion, on the one hand, that a tax of 30 percent is too high and their concession, on the other, that a tax at some lower rate would be valid. By their reasoning, there must be some rate at which the tax would pass constitutional muster, and it is evidently the task of the courts to ascertain that rate. Thus, if a tax of 30 percent is unconstitutional, suppose the legislature reenacts that tax at a rate of 25, 20, or 15 percent? Indeed, even if a tax of 30 percent is unconstitutional for one tax period, what about subsequent tax periods when the costs imposed on or the benefits provided by the state may have increased? If the judicial standard is whether the tax is fairly related to such costs and benefits, why should a rate that is held to be too high in one year be too high for a future year in which costs or benefits may

have increased due to unanticipated environmental damage or higher governmental expenditures? Does this mean that the constitutionality of the rate of the coal severance tax is to be subjected to an annual judicial review, based on a detailed inquiry into these questions? And beyond these questions, how will courts quantify benefits which the state furnishes its taxpayers? Particularly, how will it quantify the benefits of an organized society; the loss of aesthetic values; unpredictable damage to the environment; general social costs of increased crime, alcoholism and divorce in communities experiencing rapid resource development; the ultimate loss of a non-renewable resource; and the future costs of economic and social dislocation which result when a resource is mined out? How will courts take into account the fact that a tax may fall on nonresidents because of monopolistic or oligopolistic market power of the taxpayer or because of the regulatory schemes of consuming states?

The answer, obviously, is that courts are institutionally incapable of making such determinations, and they have never been charged with the responsibility of doing so. Whenever taxpayers have invited this Court to strike down a general excise tax simply on the ground that it was excessive, this Court has steadfastly refused to do so. *See, e. g., City of Pittsburgh v. Alco Parking Corp.*, 417 U. S. 369 (1974) and cases cited therein; *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934). This no doubt explains why this Court has consistently held that a tax satisfies the requirement that it be fairly related to benefits provided by the state so long as the state has provided the taxpayer with the benefits of a civilized society. See pp. 17-19, *supra*.

This is not to suggest, however, that taxpayers who feel aggrieved by the rate of a state tax affecting interstate commerce have no avenue for relief. While a court is an inappropriate forum for determining the rate of a tax, a legislative body is fully capable of making such a determination. As pointed out by the court below, the appellant coal companies "are a vigorous presence at any session of the Montana Legislature." (J. S. 26a.) And, in the context of the present controversy, it is the United States Congress that is charged with the explicit grant of power "to regulate Commerce . . . among the Several States." U. S. Const., Art. I, § 8, cl. 3. In fact, Congress is presently focusing abundant attention on national energy policy in general and on the very issues that divide the parties here. Legislation has been introduced in Congress directed specifically at the problem that appellants seek to have this Court resolve. See S. 2694, H. R. 6625, H. R. 6654, and H. R. 7163, 96th Cong., 2d Sess. (1980) (imposing 12½% rate limitation on state severance taxes on coal destined for interstate shipment). Hearings have been held on this proposed legislation. *Coal Severance Taxes: Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. (1980).[6] The legislation has been approved by the House Subcommittee on Energy and Power. Report Bulletin No. 12, Prentice Hall State and Local Taxes (All States Unit) (Sept. 16, 1980). It is therefore plain that Congress is fully aware of and in-

---

6 Hearings were also held on S. 2695 by the Senate Committee on Energy and Natural Resources, *State Tax Review,* Vol. 41, No. 37 (Sept. 9, 1980), but the hearings have not yet been printed.

volved in the conflict that only the legislative branch is capable of resolving. Armed with the extensive information provided by its hearings and by skilled congressional staffs, Congress can make an informed judgment as to whether such a limitation on state tax power is warranted. As this Court has frequently recognized, the resolution of such issues has been committed by the Constitution to the legislative branch. *See, e. g., Moorman Manufacturing Co. v. Bair,* 437 U. S. 267, 280 (1978).

For all of these reasons, institutional considerations plainly counsel judicial restraint in this controversy and reinforce the conclusion that appellants' Commerce Clause claims should be dismissed.

II. The Montana Supreme Court's decision rejecting the claims that Montana's coal severance tax is preempted by federal legislation is fully justified in light of appellants' failure to identify any federal law or policy intended to limit the amount of state severance taxes on coal.

The gravamen of appellants' preemption claims, like the substance of their Commerce Clause claims, is that Montana's coal severance tax is too high. Appellants venture no suggestion that Congress has expressly or impliedly occupied the field of coal regulation so as to preclude state severance taxes. Nor do they contend that coal severance taxes generally "frustrate" congressional objectives so as to require their invalidation under the Supremacy Clause. Rather, conceding that no federal law or policy prevents Montana from levying a coal severance tax, appellants assert that Montana's coal severance tax is preempted solely on the ground that "the tax is exces-

sive in amount." (J. S. i); *see also id.* at 15, 25-26; Brief of Plaintiffs-Appellants 46-47; 52 n. 29; 79. Because one cannot reasonably conclude from the federal legislation cited by appellants that there is any congressional purpose or policy to limit the amount of coal severance taxes, the Montana Supreme Court was entirely justified in dismissing appellants' preemption claims.

A. Montana's coal severance tax is not preempted by broad national policies allegedly favoring the use of coal.

Citing numerous federal statutes that allegedly "reflect" a general national policy to encourage the use of coal (J. S. 1-2 n. 1, 22-23) appellants assert that the amount of Montana's coal severance tax frustrates such policy and that the levy is therefore preempted. The essence of their claim is that the indirect economic impact of a state tax upon activities that are encouraged by federal legislation requires the invalidation of the state tax under the Supremacy Clause. Because such a contention inaccurately characterizes the federal policies involved, is wholly at odds with settled principles of preemption analysis, and ignores this Court's frequent recognition of state tax power as essential to the states' independent existence, the court below was clearly correct in rejecting it.

First, appellants' claim is based on the false premise that the statutes in question establish a monolithic federal policy regarding coal in general and the containment of taxes and other costs associated with coal production in particular. As the court below observed:

> [W]e do not find a national domestic energy policy or congressional enactments predicated upon a Mon-

> tana coal severance tax of fifteen percent or less. Indeed, the federal enactments point in other directions. There are incentives for the development of underground coal mines. 42 U. S. C. § 6211. There is a provision for export restrictions. 42 U. S. C. § 6212. Miners of low sulfur coal are not exempted from costly environmental strip mining regulations. 30 U. S. C. § 1251, et seq. Health and safety requirements are enforced upon strip coal miners. 30 U. S. C. § 801, et seq. Royalties on federal lands are payable under the Mineral Lands Leasing Act of 1920 as amended. 30 U. S. C. § 181, et seq. Congress seems to prefer underground coal mining. 30 U. S. C. § 1201, et seq. As the District Court found, to the distaste of the plaintiffs, Congress favors and encourages the production and use of high sulfur eastern and midwestern coal, rather than low sulfur western coal, the latter of which is to be used principally by existing facilities for which technological upgrading of air pollution control equipment is impractical or not feasible. 42 U. S. C. §§ 7411 and 7425. Indeed, § 7411, as amended in 1977, requires users of low sulfur coal nevertheless to install the "best technological system of continuous emission reduction" required for all stationary sources, even though such systems may be unnecessary because the low-sulfur coal meets the emission standards. *See*, U. S. Code Congressional and Administrative News, 95th Congress, 1977 Session, Vol. II, at 1245. Congress would rather that eastern and midwestern plants used "local coal," even coal with higher sulfur content than western low-sulfur coal. [J. S. 33a-34a.]

Second, even assuming a broad national policy to encourage the use of low sulfur coal like Montana's, it is a fundamental precept of preemption doctrine that a general policy of this nature cannot alone be the predicate for invalidating state legislation. As this Court recently declared:

> Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the [state]

> statute "undermin[es]" the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the [state] statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." *Northern Pacific R. Co. v. United States,* 356 U. S. 1, 4. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the [state] statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the [state] Legislature to enact this law. [*Exxon Corp. v. Governor of Maryland,* 437 U. S. 117, 133-34 (1978) (footnotes omitted).]

By the same reasoning, if the increased costs that a state tax imposes upon some activity that is favored by federal policy were enough to render the tax invalid, the states' power of taxation would be effectively destroyed.

Third, the ill-considered nature of appellants' claim is underscored by the fact that it is a state tax that is purportedly preempted by vague national policies. From the very beginning the Court has recognized that the states' "power of taxation is indispensable to their existence." *Gibbons v. Ogden,* 22 U. S. (9 Wheat.) 1, 199 (1824). Moreover, the exercise of state tax power has traditionally been regarded as compatible with the exercise of federal power. *Id.; see also Mobil Oil Corp. v. Commissioner of Taxes,* 100 S. Ct. 1223, 1237 (1980). The suggestion that the amount of a state tax may be limited merely because the

tax imposes increased costs on congressionally, encouraged activity flies in the face of these considerations.

Finally, it is noteworthy that Congress is presently considering legislation that would accomplish precisely what appellants seek to achieve by judicial fiat. As pointed out above (see pp. 22-23 *supra*), legislation has been introduced in Congress that would impose a 12½% rate ceiling on coal severance taxes. See S. 2695, H. R. 7725, H. R. 6654, and H. R. 7163, 96th Cong., 2d Sess. (1980).[7] Under these circumstances, it would be especially inappropriate for this Court to entertain appellants' preemption claim.

B. Montana's coal severance tax is not preempted by the Mineral Lands Leasing Act of 1920 in light of the specific provision in the Act declaring inviolate the rights of the states to impose severance taxes.

Beyond their preemption claim predicated on broad national policies to encourage the use of coal, appellants claim that the amount of Montana's coal severance tax is limited by policies underlying the Mineral Lands Leasing Act of 1920. 41 Stat. 437. As the court below properly concluded, the appellants' claim of frustration of federal policy is foreclosed by the explicit terms of the statute itself. The Act provides that

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority

---

7 The legislation is tendered as an amendment to the Powerplant and Industrial Fuel Use Act of 1978, 42 U. S. C. § 8301 *et seq.*, legislation that appellants cite as already having established a limitation on coal severance taxes. J. S. 1-2 n.1; 22.

> to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. [30 U. S. C. § 189.]

In *Mid-Northern Oil Co. v. Montana,* 268 U. S. 45, 50 (1925), this Court observed:

> No doubt what Congress immediately had in mind was the necessity of making it clear, notwithstanding the interest of the government in the leased lands, the right of the states to tax improvements thereon and the output thereof should not be in doubt; but the intention likewise to save the authority of the states in respect of all other taxable things is made evident by the addition of the three general categories, "other rights, property or assets." We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.
>
> * * *

For the foregoing reasons, appellants' claims that Montana's coal severance tax is preempted by federal legislation do not present a substantial federal question and should accordingly be dismissed.

CONCLUSION

Wherefore, appellees respectfully submit that the questions presented by the Jurisdictional Statement are not substantial federal questions. Appellees respectfully move the Court to dismiss this appeal, or, in the alterna-

tive, to affirm the judgment entered in the cause by the Supreme Court of the State of Montana.

Respectfully submitted,

MIKE GREELY
Attorney General
Counsel of Record

State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

MIKE McGRATH
Assistant Attorney General

MIKE McCARTER
Assistant Attorney General

Office of the Attorney General
State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

ROSS CANNON
Cannon & Gillespie
2031 Eleventh Avenue
Helena, Montana 59601
(406) 442-9930

ATTORNEYS FOR APPELLEES